No. 80-429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

Petitioners,

—v.—

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN, AND YVONNE M. HATTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NOW LEGAL DEFENSE AND EDUCATION FUND, WOMEN'S LEGAL DEFENSE FUND, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, WOMEN EMPLOYED, COMPARABLE WORTH PROJECT, AMERICAN NURSES ASSOCIATION, WISCONSIN WOMEN'S NETWORK, WORKING WOMEN, THE NATIONAL HOOK-UP OF BLACK WOMEN, FEDERALLY EMPLOYED WOMEN, AMERICANS FOR DEMOCRATIC ACTION, ANTIOCH SCHOOL OF LAW WOMEN'S RIGHTS CLINIC, and NATIONAL WOMEN'S POLITICAL CAUCUS, *AMICI CURIAE*

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INTEREST OF AMICI CURIAE*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 200,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that restriction of women's opportunities is a pervasive problem, the ACLU has established a Women's Rights Project to work toward the elimination of gender-based discrimination.

The ACLU has participated in virtually every case before this Court involving interpretation of Title VII's ban on sex discrimination. The Union acted as amicus curiae in Phillips v. Martin

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*Letters from counsel for both Respondents and Petitioners consenting to the filing of this brief are being filed with the Clerk.

Marietta Corp., 400 U.S. 532 (1971), concerning an employer practice of refusing to hire mothers of preschool-age children; in Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (3d Cir. 1975), vacated on juris. grounds, 424 U.S. 737 (1976), and General Electric Co. v. Gilbert, 429 U.S. 125 (1976), both concerning the Title VII rights of working women disabled by pregnancy; in Dothard v. Rawlinson, 433 U.S. 321 (1977), applying disparate impact principles to bar application of height and weight requirements which disportionately excluded women from employment, and allowing only a narrow exception to sex-neutral hiring standards for prison guards in Alabama's brutal maximum-security penitentiaries; in Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), striking down an employer practice of denying female workers returning from childbirth leaves of job-

bidding seniority; and in City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), in which an employer practice of withholding more from women's salaries than from men's salaries for pension plan contributions was held to constitute sex discrimination under Title VII.

The ACLU has also participated in most of the cases before this Court challenging sex-based discrimination under the Fifth and Fourteenth Amendments. Lawyers associated with the ACLU presented the appeal in Reed v. Reed, 404 U.S. 71 (1971), represented amicus curiae in Frontiero v. Richardson, 411 U.S. 677 (1973), represented the appellant in Kahn v. Shevin, 416 U.S. 351 (1974), the appellees in Edwards v. Healy, 421 U.S. 772 (1975), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977), petitioners in Struck v. Secretary of

Defense, 460 F.2d 1372 (9th Cir. 1971, 1972), cert. granted, 409 U.S. 947, judgment vacated and case remanded for consideration of mootness, 409 U.S. 1071 (1972), and Turner v. Department of Employment Security, 423 U.S. 44 (1975), and acted as counsel for petitioners, appellants, appellees, and amicus curiae in this Court in several other gender discrimination and women's rights cases. Currently, ACLU lawyers are co-counsel in Rostker v. Goldberg, No. 80-251, challenging male-only draft registration.

The NOW Legal Defense and Education Fund is a nonprofit civil rights organization established in 1970 to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. It was established by the National Organization for Women, a national membership organization

of over 110,000 men and women in 700 chapters throughout the country. The NOW Legal Defense and Education Fund has participated in numerous cases to secure enforcement of legal provisions barring employment discrimination.

The Women's Legal Defense Fund is a nonprofit, tax exempt membership organization founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of the equal opportunity laws.

League of Women Voters of the United States is a nonpartisan, tax-exempt non-

profit membership corporation, organized under the laws of the District of Columbia with the current membership of 117,000 in 1400 state and local Leagues located in all states, the District of Columbia, Puerto Rico and the Virgin Islands. Since its inception in 1920, the League's purpose has been to promote political responsibility through informed and active participation of citizens in government. The League believes that no person or group should suffer legal, economic, or administrative discrimination. The League is committed to the eradication of any form of discrimination that results in the undervaluation of work performed by women and minorities.

Women Employed is a non-profit organization of working women based in Chicago, Illinois, with over 2000 members who work at all levels of employment, in banks, insurance companies, stock brokerages,

engineering firms, law firms, government agencies, and all types of corporations. Women Employed has a five-year history of protecting the rights of working women by filing charges of employers' discriminatory practices with the EEOC and other government agencies to obtain appropriate remedies, and by monitoring the enforcement efforts of these government agencies on both local and national levels.

The Comparable Worth Project is a legal education and organizing project located in California whose goal is to support women workers in their efforts to eliminate economic and social discrimination in the workplace through networking, education, and advocacy. The Project maintains a clearinghouse of information on a range of topics relevant to the fact that women are not paid equally for work of equal value. Working with working women, labor unions, the general community,

public officials and employer representatives, the Project provides a speaker's bureau, technical assistance and research as well as counselling service.

The American Nurses Association (ANA), a predominantly female organization of 180,000 registered professional nurses, has always espoused equality of opportunity for all. The ANA condemns all forms of discrimination based upon race, sex, religion, or national origin.

The Wisconsin Women's Network is a coalition of Wisconsin organizations and individual women and men who have banded together to facilitate coordination, provide a common system, and strengthen advocacy for women's issues. The Network has a state-wide task force on employment equity and is in touch with individuals who constitute the class affected by this principle.

Working Women is a membership organization, with local affiliates in thirteen major cities, and with a membership spanning all fifty states. Working Women work for rights and respect for women office workers by raising the concerns of its members on public issues, pressuring the government to enforce the laws protecting women's rights, and persuading employers to institute fair employment practices.

The National Hook-up of Black Women is a national black women's advocacy group which supports pay equity for women and minority workers.

Federally Employed Women, a national membership organization, with over 240 chapters, has supported the concept of pay equity for women since the inception of the organization in 1978. The founding principles of the organization were to enhance the position and potential of women in government, increase job opportunities,

improve the merit system, and provide assistance to employees who encounter sex discrimination in the federal government.

Americans for Democratic Action is an independent political and legislative action and multi-issue organization organized in 1947. Support of the concept of pay equity is a major priority of the organization this year because it believes this to be a major step necessary to promote civil rights.

Antioch School of Law Women's Rights Clinic has been involved in the area of sex-based employment discrimination, specifically wage discrimination, for several years and was one of the co-sponsors of a conference on pay equity held in Washington, D.C. in October 1979. It has an on-going program of employment discrimination litigation.

The National Women's Political Caucus is a nationwide, multi-partisan membership organization with 45,000 members in 300 state and local caucuses across the country. The National Women's Political Caucus is dedicated to the education and full participation of women in all aspects of the political process.

STATEMENT OF THE CASE

In this Title VII sex discrimination case filed in July, 1974, four women who worked as female guards[1/] at a county jail contended that they were denied equal pay for doing work substantially equal to that performed by male guards, and alternatively, that even if the work was not substantially "equal," some of the discrepancy in pay could be explained only by sex discrimination.

[1/] The positions held by the plaintiffs were titled jail "matrons" by the county.

When Title VII was amended, effective March 24, 1972, to include state and local government employees within its coverage, all four plaintiffs had been employed as female guards at the jail for periods varying from six months to four and a half years. (Appendix to Petition for Certiorari, hereinafter "A", at pp. 58a-59a). The county jail had a men's section on the second floor and a women's section on the third floor; the personnel were likewise segregated by sex. [2/] The men's section was staffed, in 1972, by thirteen deputy sheriffs who were temporarily assigned to jail duty for periods ranging from a few days to a year.

[2/] After the county created the new positions of "Corrections Officer" and "Corrections Officer Trainee", to replace the deputy sheriffs at the jail in the summer of 1973, the new positions were officially open to both men and women. In practice, however, the new positions were held only by men.

The women's section was staffed by six full-time female guards with two guards generally working each eight-hour shift. (A. 59a.) The district court found that, on the average, there was one guard for every four men prisoners, and three guards for every woman prisoner. (A. 60a.) The duties of the male and female guards were "similar", except that the female guards were responsible for fewer prisoners and were required to perform some clerical work. (A. 59a.)

In December 1972, the county commissioners created the new positions of Corrections Officer and Corrections Officer Trainee to replace the deputy sheriffs at the jail, and to "professionalize" the job of guard. (A. 60a.) The commissioners also approved new salary ranges effective February 1, 1973. Under both the old and new ranges, the lowest male salary was higher than the highest

female salary:

	Old	New
Deputy Sheriffs	$668-853	$736-940
Deputy Sheriff Recruits	636-736	701-812[3/]
Corrections Officers	-	701-896
Corrections Officers Trainees	-	668-812
Matrons	476-606	525-668

The commissioners rejected the sheriff's proposal to increase the female guards' salaries by about 20% over the new salary amount. (A. 61a.)

In June 1973, corrections officers began to replace deputy sheriffs in the men's

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[3/] The new salary range for Deputy Sheriff Recruits listed by the district court and reprinted in Petitioners Appendix to the Petition for Certiorari, $701-812, conflicts with the range listed by the Court of Appeals, $668-812. See Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), pet. for rehearing denied, 623 F.2d 1303, 1308 (1980). Under either schedule, all women are paid less than all men.

section. Shortly after that, plaintiff Gunther asked the union, which represented both female and male guards, to demand the same pay for the female guards as for the new corrections officers. A few days later, a county official informed the female guards that because of overcrowding in the men's section, the county was considering whether to board women prisoners with another county. (A. 62a.)

In November 1973, the union and the county met to review the female guards' demands. A report was prepared shortly after the meeting which stated that the county could save substantial amounts of money per year if it boarded women prisoners outside the county and replaced the female guards with two and a half police stenographers. The commissioners adopted the proposal on December 18, 1973, and terminated the female guards as of January 15, 1974. (A. 63a.)

The district court, relying on the greater amount of clerical work performed by the female guards and the lower number of prisoners guarded by each female guard, found that compared to the male guard job, the female guard job did not require "equal" effort or responsibility. (A. 69a.) The court concluded that the jobs were not "substantially equal," and therefore plaintiffs had failed to make out a prima facie claim under Title VII. (A. 70a.)

On appeal, the Ninth Circuit Court of Appeals reviewed the record, concluded that the district court's findings were supported by the evidence, and agreed that the jobs were not "equal." (A. 30a.) That finding is not challenged here. However, the Ninth Circuit disagreed with the district court's conclusion that a claim could not be made under Title VII if the jobs were not substantially equal, and agreed with the plaintiffs that "they should be allowed to

prove that some of the discrepancy in wages was due to sex discrimination." (A. 31a.) Interpreting the Bennett Amendment to Title VII, [4] the court held that "plaintiffs are not precluded from suing under Title VII to protest other discriminatory compensation practices unless the practices are authorized under one of the four affirmative defenses contained in the Equal Pay Act and incorporated into Title VII by §703(h)." (A. 38a-39a.) Thus, the court concluded that the Bennett Amendment incorporated the Equal Pay Act's four affirmative defenses, but not its equal work standard, into Title VII. In

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[4] The Bennett Amendment, found in §703(h) of Title VII, Civil Rights Act of 1964, see 42 U.S.C. §2000e-2(h), provides in pertinent part as follows:

> It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act].

addition, the court concluded that "the broad remedial policy behind Title VII persuades us that Title VII's plain language should not be limited further in the absence of a clear Congressional directive." (A. 36a.) The panel remanded for further proceedings to "afford plaintiffs the opportunity to establish a claim of sexual discrimination apart from an equal pay claim." (A. 49a.)

In a supplemental opinion issued in denial of rehearing, the panel once again reviewed the legislative history of the Bennett Amendment, and again concluded that a wage discrimination claim can be brought under Title VII even if it could not be brought under the Equal Pay Act (A. 18a):

> All we hold here is that a plaintiff is not precluded from establishing sex-based discrimination under some other theory compatible with Title VII. It is unnecessary to determine now what theories might be feasible.

The court also expressly stated that it was not substituting a "comparable" work standard for an "equal" work standard, and held that something more than evidence of unequal compensation for "comparable" work would be necessary to establish a prima facie case under Title VII. (Respondents do not challenge that holding.) Observing that the Gunther plaintiffs had apparently presented evidence of intentional discrimination below, and may have been precluded from presenting additional evidence of discrimination, the court remanded for further proceedings in the district court. (A. 18a-19a.)

This court granted certiorari on November 3, 1980, 40 U.S.L.W. 3332 (Nov. 4, 1980).

SUMMARY OF ARGUMENT

The construction of Title VII urged by Petitioners, that Title VII plaintiffs can establish a prima facie case of discrimination in compensation only if they can show a prima facie violation of the Equal Pay Act, is inconsistent with Congressional intent and with City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978). In Manhart, the Court held that female employees had established a prima facie Title VII compensation claim by showing that the employer withheld more from their paychecks for pension payments than from the paychecks of male employees earning the same salary. The employees did not allege or show that each female employee performed work "substantially equal" to work performed by a male employee. The Court therefore authorized a compensation claim under Title VII that would not have

stated a prima facie case under the Equal Pay Act.

The result in Manhart is consistent with the broad remedial purposes of Title VII, and with the Congressional policy of treating sex discrimination with the same seriousness as discrimination on the basis of race, religion, or national origin. In addition, the very different language and scope of the two statutes demonstrate that Title VII was intended to have broader coverage than the Equal Pay Act, and that Title VII was intended to be a much more comprehensive scheme for prohibiting sex discrimination in employment. Adoption of Petitioners' position would significantly narrow Title VII coverage and would frustrate Congressional intent. (Point I).

Given the broad remedial purposes of Title VII, the Court should not adopt a construction of Title VII that would limit

the ability of women to assert Title VII sex discrimination claims unless a ruling on the proposed limiting construction is necessary in order to resolve a factual situation before the Court. In the circumstances of this case, where Respondents do not contest the burden of showing more than unequal wages for "comparable" work, it is neither necessary nor appropriate for the Court to decide whether proof of unequal wages for comparable work would, without more, establish a prima facie case, or to decide precisely what additional proof would be required to establish a prima facie case under Title VII. (Point II).

ARGUMENT

I. THE CONSTRUCTION OF TITLE VII URGED BY PETITIONERS AND REJECTED BY THE COURT BELOW IS INCONSISTENT WITH CONGRESSIONAL INTENT AND WITH CITY OF LOS ANGELES V. MANHART.

INTRODUCTION

Congress intended Title VII to be broader than the Equal Pay Act. As the legislative history and City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), make clear, women can assert sex discrimination in compensation claims under Title VII they could not assert under the Equal Pay Act. Petitioners' argument that Title VII plaintiffs can establish a prima facie case of discrimination in compensation only if they could show a prima facie violation of the Equal Pay Act is therefore inconsistent with Congressional intent and with Manhart.

A. In Manhart, the Court Authorized A Compensation Claim Under Title VII That Could Not Have Been Brought Under The Equal Pay Act.

In Manhart, the Court held that female employees had established a prima facie compensation claim under Title VII [5] by showing that the government employer withheld 14.84% more from their paychecks for pension payments than from the paychecks of male employees earning the same salary.[6]

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[5] The female employees in Manhart asserted a violation of §703(a)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a)(1), which provides:

> It shall be an unlawful employment practice for an employer--
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin....

[6] Each employee covered by the pension plan in Manhart was eligible, upon retirement, for a monthly retirement benefit computed as

(footnote cont'd next page)

The plaintiffs in Manhart had not alleged or proved that the male and female employees performed equal work.[7] Because they did not allege that the jobs performed by women required equal skill, effort and responsibility, and were performed under similar working conditions as the jobs performed by men, the Manhart plaintiffs could not have stated a

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(footnote cont'd from previous page)

a fraction of his or her salary multiplied by years of service. The monthly benefits for men and women of the same age, seniority and salary were equal. Because the cost of the pension for the average retired female was greater than for the average retired male, based upon longevity, the plan required female employees to make higher monthly contributions. Thus, a female employee took home less pay than a male employee earning the same salary. Id. at 705.

[7] As one commentator has noted, it is probable that the female employees could not have shown that they were performing equal work. See Blumrosen, Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964, 12 U. of Mich. J.L. Ref. 397, 483-84 (1979).

claim under the Equal Pay Act.[8/] The Court has therefore authorized a compensation claim under Title VII that could not be brought under the Equal Pay Act. The Court concluded that the compensation differential

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[8/] The Equal Pay Act provides, 29 U.S.C. §206(d), in part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

constituted unlawful discrimination under Title VII,[9/] and that the discriminatory practice was not exempted by the Equal Pay Act or any other justification.

In addition to establishing that the Equal Pay Act's prima facie requirements should not be incorporated into Title VII, the Court suggested in Manhart that the Bennett Amendment should be interpreted as incorporating only the four affirmative defenses of the Equal Pay Act into Title VII (Manhart, 435 U.S. at 712 n.23):

> [We] need not decide whether retirement benefits or contributions to benefit plans are 'wages' under the [Equal Pay] Act, because the Bennett Amendment extends the Act's four exceptions to all forms of 'compensation' covered by Title VII.

[9/] As the Court stated, per Justice Stevens, Manhart, 435 U.S. at 711:

> An employment practice that requires 2,000 individuals to con-

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This view of the Bennett Amendment is exactly the position taken below in Gunther by the Ninth Circuit. Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), pet. for reh. denied, 623 F.2d 1303 (1980). The legislative history[10/] which supports this interpretation of the Bennett Amendment is thoroughly discussed by the Third Circuit in I.U.E. v. Westinghouse Electric Corp., 631 F.2d 1094 (3rd Cir. 1980), pet. for cert. filed November 14, 1980, 49 U.S.L.W. 3410 (Dec. 2, 1980), and by the panel in Gunther.

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> tribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the [Civil Rights] Act.

[10/] See also note 35 infra, supporting the conclusion that the Bennett Amendment incorporates only the Equal Pay Act's four exceptions into Title VII.

B. The Result in Manhart Is Consistent With The Broad Remedial Purposes of Title VII.

Manhart's recognition that Title VII is broader than the Equal Pay Act is consistent with the broad remedial purposes of Title VII, and with the Congressional policy of treating sex discrimination with the same seriousness as discrimination on the basis of race, religion or national origin. See Manhart, 435 U.S. at 709.

The remedial goals of both the race and sex discrimination provisions were strongly reaffirmed by Congress in 1972, when Congress expanded Title VII coverage to include state and local government employees. 11/ In explaining the necessity

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11/ Equal Employment Opportunity Act of 1972, Pub.L. 92-261, §2, 86 Stat. 103, see 42 U.S.C. §2000e(a) and (f). Because the Gunther plaintiffs were included in Title VII coverage only after the 1972 amendments became effective March 24, 1972, the 1972 legislative history is directly relevant to the instant case.

for the 1972 amendments to Title VII, the House Committee on Education and Labor reviewed the grave economic impact of discrimination on women workers by comparing average salaries of women and men:

> Recent statistics released from the U.S. Department of Labor indicate that there exists a profound economic discrimination against women workers. Ten years ago, women made 60.8% of the average salaries made by men in the same year....Similarly, in that same year, 60% of women, but only 20% of men earned less than $5,000. At the other end of the scale, only 3% of women, but 28% of men had earnings of $10,000 or more. 12/

The Committee then noted that those substantial economic disparities are the result of discrimination against women as a class. Id.:

12/ H.R. Rep. No. 92-238, 92d Cong., 2d Sess. (1971)[To accompany H.R. 1746], reprinted in 1972 U.S. Code Cong. & Ad. News 2140.

> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.

Despite efforts of the courts and EEOC since 1964, [13/] the Committee observed that "discrimination against women continues

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13/ The legislative history of Title VII of the Civil Rights Act of 1964 also supports the conclusion that Congress intended to treat the inclusion of sex discrimination with the same seriousness as discrimination on the basis of race, religion, or national origin. Although the legislative history of the sex discrimination provision of the 1964 Act has been described as "notable primarily for its brevity", see General Electric Co. v. Gilbert, 429 U.S. 125, 143 (1976); but see Berger, Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women, 5 Val. U.L. Rev. 326, 330-37 (1971), the amendment adding sex discrimination to the other discriminations prohibited by Title VII received strong support in the House debates from four Congresswomen, and also from several Congressmen, who urged its adoption to assure full employment rights for both

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to be widespread, and is regarded by many as either morally or physiologically justifiable." Id. at 2141. The Committee then specifically rejected the notion that sex discrimination is less serious than other forms of employment discrimination. Id.:

> This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination. (emphasis added).

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minority and white women, and to supercede discriminatory state "restrictive" laws which had long been used as an excuse for discrimination against women by both employers and labor unions. See Congressional Record, 88th Cong., 2d Sess., 110 Cong. Rec. 2577-84 (1964); see generally Gitt & Gelb, Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII, 8 Loy. U.L.J. 723, 742-49 (1977); Berger, supra at 330-37.

Congress recognized in 1972 that discrimination is more subtle and complex than had been imagined in 1964, and therefore described the problem in terms of "systems" and "effects" rather than simply "intentional wrongs." S. Rep. No. 92-415, 92d Cong., 1st Sess. 5 (1971). 14/ Thus, in 1972, Congress reaffirmed its basic commitment, first announced in 1964, to prohibit

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14/ The Senate Committee on Labor and Public Welfare, in addressing the need for stronger EEOC enforcement powers, stated the following:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing

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sex-based employment discrimination in all its forms.

Even without reference to the legislative history, a comparison of the language of Title VII [15] with that of the Equal Pay Act [16] sharply outlines the difference in scope between the two statutes, and shows

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and validation requirements. [Footnote omitted.] S. Rep. No. 92-415 at 5. Accord, H.R. Rep. No. 92-238, 92d Cong., 2d Sess. (1971), reprinted in 1972 U.S. Code Cong. & Ad. News, 2143-44.

15/ See §703 of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 255, 42 U.S.C. §2000e-2(a).

16/ See §6(d)(1) of the Fair Labor Standards Act of 1938, as added by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. §206(d)(1).

that Congress obviously intended Title VII to have much broader coverage than the Equal Pay Act, which had been enacted only a year earlier. In broad, comprehensive language, Section 703(a) of Title VII [17] provides that it shall be an unlawful employment practice for an employer either

> 1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
>
> or
>
> 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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[17] 42 U.S.C. §2000e-2(a).

Title VII prohibits sex discrimination not only with respect to "compensation" and "classification," but also in hiring, assignment, promotion, and discharge. Thus, a broad range of discriminatory practices may be challenged under Title VII.

In contrast, the Equal Pay Act's prohibition of sex discrimination applies only in one narrowly-defined situation (29 U.S.C. §206(d)(1)):

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions....

The focus of the Equal Pay Act, in compari-

son to Title VII, is on "wages" or "pay"[18] rather than "compensation" and "classification". Under the Equal Pay Act, a prima facie case can be established only if the following factors are present: 1) the jobs being compared are within the same "establishment"; 2) the discrimination concerns pay; 3) the jobs involve substantially equal work; [19] 4) performance of the jobs require substantially equal skill; 5) substantially equal effort; and 6) substantially equal responsibility; and 7) the jobs are performed under similar working conditions.

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[18] See 29 C.F.R. §800.110. The regulations define "wages" paid to an employee as "all payments made to or on behalf of the employee as remuneration for employment," including the fair value of non-cash items such as room and board, 29 C.F.R. §800.112, but not including bona fide gifts or certain discretionary bonuses, 29 C.F.R. §800.113. See generally 29 C.F.R. §§800.110-800.116.

[19] The jobs need not be "identical," but only "substantially equal." See Corning Glass Works v. Brennan, 417 U.S. 188, 203 n.24 (1974); Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970), cert. denied, 398 U.S. 905 (1970).

Not one of these prima facie case requirements is specified in Section 703 (a) of Title VII. If Congress had intended to limit sex discrimination compensation cases to the narrow factual setting covered by the Equal Pay Act, surely Congress would have done so with specific statutory language making it clear that such a substantive limitation on the prima facie case was intended.

Apart from the narrow scope of the Equal Pay Act, there are additional substantive and procedural limitations on suits brought under the Equal Pay Act that do not limit suits under Title VII. The employee coverage of the Equal Pay Act, for example, derives from the coverage of the minimum wage law, [20/] which

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20/See 29 U.S.C. §206(a). The coverage of the Equal Pay Act differs from the minimum wage law in only two respects. First, all executive, administrative, and professional employees exempted from minimum wage coverage are covered by the Equal Pay Act. 29 U.S.C. §213(a)(1). Second, labor organizations which are not included in the minimum

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applies to any "establishment" of an "enterprise" engaged in interstate commerce. [21/] Specific statutory exemptions, however, deny protection to certain groups of employees, including:

(footnote cont'd from previous page) wage law, 29 U.S.C. §203(d), are prohibited in the Equal Pay Act from causing an employer to violate the Act. 29 U.S.C. §§206(d)(2), 206(d)(4).

21/29 U.S.C. §§206(d)(1), 206(a). 29 C.F.R. §800.108. Compare Brennan v. Goose Creek Consol. Independent School Dist., 519 F.2d 53 (5th Cir. 1975)(school district, not each separate school, is the "establishment"), with Wetzel v. Liberty Mutual, 449 F.Supp. 397 (W.D. Pa. 1978) aff'd in part, vac'd in part, 508 F.2d 239 (3d Cir. 1975), cert. denied, 421 U.S. 1011 (1975)(each separate branch office, not the overall company, is the establishment).

A recent federal district court decision has erroneously interpreted the Bennett Amendment to Title VII, §703(h), 42 U.S.C. §2000e-2(h), to require a plaintiff bringing a Title VII equal pay claim to show that the jobs are within the same "establishment." See Davis v. Western Elec. Co., 24 F.E.P. Cases 65 (M.D.N.C. July 6, 1979). Thus, if Petitioners' argument regarding the meaning of the Bennett Amendment is adopted by the Court, the single establishment element required to make out a prima facie Equal Pay Act claim would also be incorporated into Title VII, further limiting Title VII sex discrimination coverage.

1) employees who work for amusement or recreational establishments which are in operation during fewer than eight months per year; [22] 2) employees in the fish industry who catch, cultivate, process, can, or pack fish; [23] 3) certain employees of agricultural farms; [24] 4) employees of small newspaper publishers whose regular circulation is less than four thousand papers; [25] and 5) employees who work as switchboard operators for small, independently owned public telephone companies.[26]

Title VII, on the other hand, applies to all employers engaged in interstate commerce who have fifteen or more employees,[27]

22/29 U.S.C. §213(a)(3).

23/29 U.S.C. §213(a)(5).

24/29 U.S.C. §213(a)(6).

25/29 U.S.C. §213(a)(8).

26/29 U.S.C. §213(a)(10).

27/42 U.S.C. §2000e(b).

without the specific exemptions of the Equal Pay Act. 28/ And Title VII, unlike the Equal Pay Act, covers discriminatory practices of labor unions 29/ and employment agencies. 30/

Another difference in employee coverage between the two statutes existed from 1972 to 1974, when Title VII prohibited sex discrimination by state and local governmental employers, 31/ but the Equal Pay Act

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28/Like the Equal Pay Act, however, Title VII exempts elected public officials from employee coverage. Compare 42 U.S.C. §2000e(f) with 29 U.S.C. §203(e)(2)(C).

29/42 U.S.C. §2000e-2(c). See note 20, supra. Although the Equal Pay Act prohibits unions from causing an employer to violate the Act, an employee does not have a private right of action against a union under the Equal Pay Act. Tuma v. American Can Co., 367 F.Supp. 1178, 1181 (D.N.J. 1973). Only the government may bring an action against the union under the Equal Pay Act.

30/42 U.S.C. §2000e-2(b).

31/Title VII was amended, effective March 24, 1972, to include state and local government employees within its coverage. Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103, see 42 U.S.C. §2000e(a) and (f).

did not. [32] The Gunther plaintiffs themselves, therefore, were precluded from bringing suit under the Equal Pay Act. Since 1974, state and local government employees have been able to sue under both Title VII and the Equal Pay Act. [33]

A major procedural difference between Title VII and the Equal Pay Act also limits

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32/The Fair Labor Standards Act was amended, effective May 1, 1974, to include state and local governments in the statutory definition of "employer." Fair Labor Standards Amendments of 1974, Pub.L. 93-259, 88 Stat. 55, April 8, 1974, see 29 U.S.C. §203(d). Although the Equal Pay Act covered governmental employers in July 1974, when the Gunther plaintiffs sued, it did not cover governmental employers prior to January 15, 1974, when the jobs held by the Gunther plaintiffs were terminated.

33/Because the reasoning of National League of Cities v. Usery, 426 U.S. 833 (1976) (application of the minimum wage law to state and local government employees held unconstitutional) does not apply to the Equal Pay Act, courts have uniformly held that the Equal Pay Act continues to protect state and local government employees. E.g., Marshall v. A&M Consol. Independent School Dist., 605 F.2d 186 (5th Cir. 1979); Pearce v. Wichita County, 590 F.2d 128 (5th Cir. 1979); Marshall v. Kent State

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the Equal Pay Act as an effective means of challenging widespread wage discrimination practices. Under the Equal Pay Act, Rule 23 class action suits on behalf of unnamed employees are not permitted. Instead, all employees must be among the named plaintiffs who initially file suit, or shortly thereafter must file written consents with the court, agreeing to be a party.[34/] No such restriction on Rule 23 class actions applies to Title VII claims.

In summary, the very different language and scope of the two statutes demonstrates, even without regard to the legislative history, that Title VII was intended to

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State Univ., 589 F.2d 255 (6th Cir. 1978); Marshall v. Owensboro-Daviess County Hosp. 581 F.2d 116 (6th Cir. 1978); Usery v. Charleston County School Dist., 558 F.2d 1169 (4th Cir. 1977); Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977).

34/See 29 U.S.C. §216(b)and (c). See, e.g., Kinney Shoe Corp. v. Vorhes, 564 F.2d 859 (9th Cir. 1977); Schmidt v. Fuller Brush Co., 527 F.2d 532 (8th Cir. 1975). Cf. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 n.6 (1979).

have broader coverage than the Equal Pay Act, and that Title VII was intended to be a much more comprehensive scheme for prohibiting discrimination in employment.

C. Adoption of Petitioners' Position Would Narrow The Coverage of Title VII and Would Frustrate Congressional Intent.

Adoption of Petitioners' argument that Title VII plaintiffs can establish a prima facie case of discrimination in compensation only if they can show a prima facie violation of the Equal Pay Act would significantly narrow Title VII coverage, and in many cases would unnecessarily complicate the proof required to assert a Title VII claim.

In Manhart-type cases, for example, female plaintiffs within each salary level could arguably be required to show that they perform work "equal" to that performed

by men. [35] Comparison of salary classifications might no longer be sufficient. If a group of female employees (for example, female secretarial employees) had

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35/The equal work requirement would not be applicable to Gilbert-type pregnancy disability payments cases because of the specific reference to §703(h) in the 1978 Pregnancy Discrimination Act amendment to Title VII, Pub.L. 95-555, 92 Stat. 2076, Oct. 31, 1978, 42 U.S.C. §2000e(k), which provides in part as follows:

> [W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. (emphasis added)

The disclaimer was thought necessary because of the Court's reliance in part on the Bennett Amendment in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), and an Equal Pay Act regulation which provided that certain gender-based differentiations in fringe benefits did not constitute a pay differential under the Equal Pay Act. H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4755. As the

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no male analog (i.e., there are no men in the same "establishment" who perform

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Senate Committee stated,

> The Supreme Court seems to believe, despite apparently contradictory Equal Pay Act regulations, that the discrimination in question in Gilbert would be authorized by the Equal Pay Act. See 29 C.F.R. 800.151. It is the committee's opinion that any application of the Bennett amendment which assumes that that provision insulates from title VII all compensation and fringe benefit programs which do not also violate the Equal Pay Act, is not correct; by expressly precluding reliance on section 703(h) in this context, therefore, the committee merely intends to insure that employers may not rely on the Equal Pay Act to prevent the correction of pregnancy discrimination under title VII.

S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977), at 7, reprinted in Legislative History of the Pregnancy Discrimination Act of 1978, at 44 (1980) (prepared for Sen. Comm. on Labor and Human Resources).

In discussing the Bennett Amendment, neither committee assumes that the Bennett Amendment requires that equal work must be shown in order to bring a Title VII

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secretarial work),[36] they might be precluded from making a Title VII compensa-

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compensation claim. The Senate Committee does assume, however, that the Bennett Amendment incorporates only the Equal Pay Act's four exceptions into Title VII, id.:

> [T]he Bennett amendment...provides that if a practice is authorized by the Equal Pay Act, 29 U.S.C. §206(d) - that is, if it is within one of the four enumerated exceptions to the Equal Pay Act - then it is not unlawful under title VII.

It would be an anomalous result to allow a pregnancy fringe-benefit claim to be brought without a requirement of showing equal work, but to disallow a similar pension claim brought by the same plaintiffs.

[36] 99.1% of all secretaries in the nation are women. See U.S. Dept. of Labor, Employment Standards Administration, Women's Bureau, 1975 Handbook on Women Workers, p. 90.

tion claim. On the other hand, women employees in jobs which were also performed by men (for example, payroll and timekeeping clerks) [37] would be able to claim a Title VII violation based upon the greater amount deducted from their paychecks due to sex-determined pension payments. Thus, under Petitioners' argument, a Manhart-type employer would have two classes of women employees: 1) women who could make out a Title VII claim because of a male analog in their job classification, and 2) women who could not make out a Title VII claim because there were no men performing a substantially "equal" job. Such an anomalous interpretation of Title VII would frustrate the remedial purposes of Title VII, and should be rejected. In addition, it would clearly contravene legislative intent for this Court to treat Title VII

37/ 72.2% of all payroll and timekeeping clerks are women. Id.

sex-based wage discrimination claims differently from race or other forms of employment discrimination. 38/

38/ As the Court stated in Manhart, 435 U.S. at 709:

> But the question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful. Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex. But a statute that was designed to make race irrelevant in the employment market, see Griggs v. Duke Power Co., 401 U.S. 424, 436, 28 L.Ed. 2d 158, 91 S.Ct. 849, could not reasonably be construed to permit a take-home-pay differential based on a racial classification. (footnotes omitted).

Under Petitioners' argument, women could not sue under Title VII for discrimination in compensation unless they performed jobs substantially equal to jobs performed by men under the standards of the Equal Pay Act. Black employees, however, would be able to sue for the same compensation discrimination under Title VII whether or not a white employee performed substantially equal work. Cf. Quarles v. Philip Morris, Inc., 279 F.Supp.

In summary, the Bennett Amendment cannot be construed to limit the ability of women to make out a prima facie Title VII compensation discrimination claim to those narrow instances in which the claim could be made under the Equal Pay Act. As the 1972 legislative history shows, Congress was aware of the widespread economic discrimination against women, and specifically reaffirmed its intention that Title VII should serve as a comprehensive prohibition of all forms of sex-based employment discrimination, no matter how pervasive, subtle, or complex. 39/

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505, 509 (E.D. Va. 1968)("casing attendant" job involving flavoring of tobacco, a job always filled by blacks, is compared to basic machine operator job, reserved for whites)

Adoption of Petitioners' position would mean that blacks and other minorities would be able to bring a Title VII suit, while a white woman without a male analog would not be able to sue for the same discriminatory compensation practice.

39/See generally, Gitt & Gelb, Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII, 8 Loy.U.L.J. 723 (1977).

II. IN THE CIRCUMSTANCES OF THIS CASE, IT IS NEITHER NECESSARY NOR APPROPRIATE FOR THE COURT TO DECIDE WHETHER PROOF OF UNEQUAL WAGES FOR "COMPARABLE" WORK IS, WITHOUT MORE, SUFFICIENT TO ESTABLISH A PRIMA FACIE CASE UNDER TITLE VII.

Given the broad remedial purposes of Title VII, this Court should not adopt a construction of Title VII that would limit the ability of women to assert Title VII sex discrimination claims unless a ruling on the proposed limiting construction is necessary in order to resolve a factual situation presently before the Court.[40] Here, the Court of Appeals has held that Respondents must show something more than

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40/ Social or remedial legislation should be construed and applied to fulfill the underlying purposes which Congress sought to achieve. See United Steelworkers of America v. Weber, 443 U.S. 193, 201-04 (1979); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421-22 (1975); see also Gomez v. Toledo, 64 L.Ed.2d 572, 576-77 (1980) (§1983); Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978)(§1983); Corning Glass Works v. Brennan, 417 U.S. 188 (1974)(Equal Pay Act).

unequal wages for "comparable" work in order to establish a prima facie case.[41/] Because Respondents do not contest assumption of that burden, it is neither necessary nor appropriate for this Court to decide whether proof of unequal wages for comparable work would, without more, establish a prima facie case, or to decide precisely what additional proof would be required to establish a prima facie case.

41/ Gunther v. County of Washington, 623 F.2d 1303, 1321 (9th Cir. 1980). Comparability of jobs may be shown through use of job evaluation techniques, widely applied since the 1930's, which evaluate the general categories of skill, responsibility, and effort required, and the working conditions under which the job is performed. See generally, Gitt & Gelb, Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII, 8 Loy.U.L.J. 723, 734- 40 (1977). These are the same techniques which have been used in Equal Pay Act cases to quantify work content where the jobs are alleged to be substantially equal. See Corning Glass Works v. Brennan, 417 U.S. 188, 199-201(1974); Shultz v. Hayes Indust., Inc., Civil No. 68-4 (N.D. Ohio

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The Court of Appeals quite narrowly decided that Title VII may support a theory of sex-based wage discrimination that could not be brought under the Equal Pay Act. The Court declined to decide what theories under Title VII could establish a sex-based wage discrimination claim, stating only that something more than evidence of unequal wages for comparable work would be

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April 14, 1970)(expert testimony of job analyst used to prove violation of Equal Pay Act); see generally Murphy, Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970, 39 U.Cin. L.Rev. 615, 634-37 (1970). A violation of the Equal Pay Act may be established even if job titles are different and the official job descriptions specify different duties. Courts look to actual job performance. See Katz v. School Dist. of Clayton, 557 F.2d 153, 156 (8th Cir. 1977)(teacher assistant and teacher); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978)(stewardess and purser); Peltier v. City of Fargo, 533 F.2d 374 (8th Cir. 1976)(car marker and police officer); DiSalvo

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required to establish a prima facie case. Gunther v. County of Washington, 623 F.2d 1303, 1321 (1980).

The Respondents have not challenged the Ninth Circuit's holding in this regard.

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v. Chamber of Commerce of Greater Kansas City, 568 F.2d 593 (8th Cir. 1978), aff'g 416 F.Supp. 844 (W.D. Mo. 1976)(associate editor and communications specialist).

Such job evaluation techniques have also commonly been used to evaluate "comparable" jobs across different job lines. The states of Washington and Michigan, for example, have utilized such techniques to assess the extent to which sex-segregated jobs have resulted in unequal compensation for comparable jobs. See Office of Women and Work and the Michigan Employment Security Commission, Occupational Analysis Field Center, Research and Statistics Division, A Comparable Worth Study of State of Michigan Job Classifications (n.d.); N.D. Willis and Associates, State of Washington Comparable Worth Study (1974). Indeed, employers have themselves utilized such job evaluation systems to assign equal point ratings to comparable jobs. See, e.g., I.U.E. v. Westinghouse Electric Corp., 631 F.2d 1094, 1097 (3rd Cir. 1980), pet. for cert. filed, November 14, 1980, 49 U.S.L.W. 3410 (Dec. 2, 1980).

To the contrary, they attempted to present additional evidence in order to establish their prima facie case. As noted by the Ninth Circuit, id.,

> The Gunther plaintiffs apparently presented evidence of intentional discrimination that was not considered by the district court because the district court believed that disposition of the equal pay claims was the end of the inquiry. It is unclear from the record whether the plaintiffs were prevented from presenting other evidence that might have established a claim of sex discrimination.

The court committed to the district court's discretion the extent of further proceedings necessary to consider plaintiffs' additional evidence of discrimination. Id. Thus, the Ninth Circuit ruled only that various theories of sex-based wage discrimination are permissible under Title VII,[42/] and that

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42/ The Court of Appeals in Gunther posited two examples of harmful discriminatory compensation practices not covered under the

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proof of unequal wages for comparable work is a sufficiently suspicious circumstance to warrant further judicial inquiry to determine whether the pay disparity is innocent or the result of sex discrimination.

Given the Ninth Circuit's narrow holding and the willingness of the Respondents to assume the burden of showing more than unequal wages for "comparable" work,[43/] it

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Equal Pay Act: 1) an employer tells a female worker, employed at a position where she has no male counterpart, that she would receive $30 a week more if she were male; and 2) an employer decreases the wages of women employed in a type of job that is held primarily by women and is comparable, but not substantially equal to that performed by men, solely because of their sex. Gunther v. County of Washington, 602 F.2d 882, 890 n.9 (9th Cir. 1979).

43/ In the instant case, Respondents assert they can prove intentional discrimination or wage disparities which are attributable only to the sex of the worker.

is inappropriate for this Court, at this time, to decide whether proof of unequal wages for "comparable" work is, without more, sufficient to establish a prima facie case under Title VII.

A recent Third Circuit decision provides one example of what more could be shown to prove that pay disparity in comparable jobs results from sex discrimination. In I.U.E. v. Westinghouse Electric Corp., 631 F.2d 1094 (3d Cir. 1980), pet. for cert. filed November 14, 1980, 49 U.S. L.W. 3410 (Dec. 2, 1980), the plaintiffs alleged that in the 1930's, the employer analyzed and assigned points to each job on the basis of a gender-neutral job rating system and then deliberately set lower wage rates for jobs occupied by women than for those held by men, even though the "male" and "female" jobs were rated equally. The point ratings were based on the employer's evaluation of the knowledge and training

required, and the specific demands and responsibilities of the jobs. The plaintiffs alleged that when the male and female wage scales were unified in 1965, the new wage scale embodied the deliberately discriminatory policy of the prior plan. The Third Circuit concluded that even though the alleged facts could not support an Equal Pay Act claim because the jobs compared were not substantially "equal," the plaintiffs should be given an opportunity to present their Title VII claim based on intentional sex discrimination.

Although the plaintiffs in both I.U.E. and Gunther alleged "deliberate" or "intentional" wage discrimination against women, it would be inappropriate and unnecessary for this Court to rule that these or other Title VII plaintiffs must always show intent in order to establish a prima facie wage

discrimination case.[44] All the Court

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[44] Requiring "intent" would not sufficiently clarify the proof that is necessary. It is unclear even in constitutional cases, for example, what "intent" means. See generally, Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). The meaning of "intent" varies in different factual circumstances, and can require different showings depending on whether it is required as a part of the prima facie case or as a defense. Compare Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)("discriminatory purpose" implies "more than intent as volition or intent as awareness of consequences") with Wood v. Strickland, 420 U.S. 308, 322 (1975)(good faith defense fails if public official knew "or should have known" that his conduct was unlawful). Furthermore, an interpretation of intent that might be appropriate in the context of constitutional litigation would be quite inappropriate in the context of a remedial statute enacted to end employment discrimination. Cf. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971). The requisite intent plaintiffs must arguably show in disparate treatment, as opposed to admittedly class-based policies (e.g., Manhart) or disparate impact, cases brought under Title VII is an important question that need not be decided in this case, and should not be decided on the present record. Cf. Burdine v. Texas Dep't of Community Affairs, 608 F.2d 563 (5th Cir. 1979), cert. granted, 65 L.Ed.2d 1112 (1980).

need decide now is that sex discrimination claims involving compensation are not strictly limited to those which could be brought under the Equal Pay Act. Affirmance would not mean that Respondents prevail. It would merely provide Respondents the opportunity to present additional evidence in support of their claim. Only after development of such a factual record on remand would it be appropriate to determine whether the facts establish a prima facie case of Title VII discrimination. Consideration of the possible elements of the prima facie case without such a record[45/] would involve the Court in unnecessary speculation.

45/ In addition, a ruling requiring intent in all wage compensation claims would be inconsistent with the principle established in Griggs v. Duke Power Co., 401 U.S. 424 (1971). For example, a facially neutral employment policy under which employees

(footnote cont'd on next page)

The Court should refrain from deciding this important question in the abstract. As Justice Frankfurter wrote in his concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 154-55 (1950), courts do not review issues until they have to:

> In part, this practice reflects the tradition that courts, having final power, can exercise it most wisely by restricting themselves to situations in which decision is necessary. In part, it is founded on the practical wisdom of not coming prematurely or needlessly in conflict with the executive or legislature.

(footnote cont'd from preceding page)

who are heads-of-households receive wage bonuses would violate Title VII if significantly fewer women or black employees qualified for such a bonus. Furthermore, requiring intent would be inconsistent with the explicit Congressional desire to prohibit discriminatory "systems" and "effects," not "simply intentional wrongs." See note 14, supra.

See also Ashwander v. Tennessee Valley Au-Auth., 297 U.S. 288, 341 (1935)(Brandeis, J., concurring).

This policy of judicial restraint, appropriate in all circumstances, is particularly appropriate here where remedial legislation is involved, where the Respondents do not contest the burden of showing more than unequal wages for comparable work, and where the present factual record does not permit non-speculative resolution of the ultimate proof requirements.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

Dated:

New York, New York
January 28, 1981

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